

Taking the Lead on Cyberbullying: Why Schools Can and Should Protect Students Online

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ABSTRACT: This Note argues that schools are the best line of defense against the growing problem of cyberbullying and offers a guide for schools wary of First Amendment lawsuits by students punished for their cyberspeech. In many cases, a student engaging in cyberbullying of a classmate will create a substantial disruption at school or interfere with the right of the victim to an environment conducive to learning, thus justifying action by the school under the Tinker standard. Other Supreme Court cases regarding indecent or offensive speech and speech the Court viewed as promoting drug use may provide helpful arguments for schools accused of overstepping constitutional boundaries. This Note also suggests that schools may wish to argue that courts should show more deference to disciplinary decisions made by schools that have punished students for cyberspeech directed at another student as opposed to cyberspeech about a school official. Courts could make this distinction based on an analogy to defamation law.

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I. INTRODUCTION

Bullies, unfortunately, have been a fixture of the American classroom for years. For most everyone who has attended elementary and secondary school, it is not difficult to remember the feeling of being bullied by a classmate or watching another student experience the same. Victims of a traditional bully could enjoy temporary relief from the embarrassment and discomfort when they returned home from school for the evening. Victims of today's new "cyberbullies," however, cannot escape their tormentors as long as they stay connected to the Internet and other media that have become social lifelines for many of today's youth.¹ The impersonal nature of online communication often leads children to post or send hurtful things they would never say in person.² While many young people eventually learn to halt or cope with cyberbullying, there are several sad examples of those who do not.³ Ryan Halligan was one such student—he tragically committed suicide at the age of thirteen after a long period of cyberbullying, which his parents learned about only after his death.⁴

1. See Stacy M. Chaffin, Comment, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773, 784–87 (2008) (providing an overview of websites that cyberbullies commonly use, including MySpace, Facebook, YouTube, and forum sites such as *ihateher.com*).

2. See Kevin Turbert, Note, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 654 (2009) ("Psychologists have also found that 'the distance between bully and victim . . . is leading to an unprecedented—and often unintentional—degree of brutality, especially when combined with a typical adolescent's lack of impulse control and underdeveloped empathy skills.'" (quoting Amy Harmon, *Internet Gives Teenage Bullies Weapons To Wound from Afar*, N.Y. TIMES, Aug. 25, 2004, at A1)).

3. The most highly publicized victim of cyberbullying is Megan Meier, a thirteen year old who committed suicide after receiving a series of hurtful messages from a Myspace "friend" she believed was a teenage boy but was actually the mother of a classmate; the woman created the profile to see if Megan would criticize the woman's daughter. Andrew M. Henderson, Note, *High-Tech Words Do Hurt: A Modern Makeover Expands Missouri's Harassment Law To Include Electronic Communications*, 74 MO. L. REV. 379, 379–80 (2009). Although this case involved an adult rather than a student cyberbully, and thus is not directly relevant to this Note, it does illustrate the lack of effective remedies currently available to cyberbullying victims. Authorities were "unable to charge" Lori Drew, the mother who created the false profile, with any crime. *Id.* at 393. For more examples of cyberbullying victims, see Chaffin, *supra* note 1, at 774–75. The case of Kylie Kenney provides a particularly helpful illustration of cyberbullying. Kylie's classmates created a website meant to show people that they thought Kylie was "gay" and entitled it "Kill Kylie Incorporated." *Id.* (internal quotation marks omitted).

4. RYAN'S STORY, <http://www.ryanpatrickhalligan.com> (last visited Mar. 25, 2011). Ryan's parents set strict rules for his Internet usage, including sharing with them all passwords he used for online activities and not sharing pictures or any sort of personal information with strangers. *Id.* After his death, his parents used his instant-messaging password to access his account and discovered how his fellow students had harassed him about his perceived sexual orientation and his attempts to begin a relationship with a popular female student online. *Id.* The female student had conversations with Ryan through instant messaging and then shared those conversations with peers, who used the conversations to tease and humiliate Ryan. *Id.*

Current law provides few sure remedies for victims of cyberbullying.⁵ As more stories like that of Ryan Halligan come to light and awareness of cyberbullying grows, states are beginning to enact legislation calling on schools to develop anti-bullying policies and procedures that include online speech.⁶ Schools must, however, be wary of violating students' First Amendment right to free speech when punishing them for online speech that often originates from an off-campus computer or other electronic device. Supreme Court precedent on student speech does not speak directly to online speech, and lower-court decisions on online-student speech have almost exclusively dealt with student speech regarding school officials.⁷ Thus, there is little authoritative precedent addressing the specific situation this Note will consider—a school facing a First Amendment claim after punishing a student for online speech about *another student*. This uncertainty in the law may lead school officials to tread lightly when dealing with cyberbullying for fear of making a wrong move that would lead to a successful lawsuit.

This Note argues that schools can and should aggressively punish cyberbullying while still respecting the purpose and spirit of the First Amendment. Part II provides background on the definition and prevalence of cyberbullying, as well as legislative responses, with a particular focus on an Iowa law that requires schools to draft their own anti-bullying policies. Part II then discusses relevant Supreme Court and lower-court precedent on this issue. Part III argues that schools are the best line of defense against cyberbullying and outlines a defense strategy for a school accused of overstepping constitutional boundaries.

5. See Henderson, *supra* note 3, at 393–94 (noting that, in the infamous death of Megan Meier, authorities found it difficult to charge the author of the harassing statements with any crime, though they ultimately succeeded in prosecuting her for computer fraud). See generally Shira Auerbach, Note, *Screening Out Cyberbullies: Remedies for Victims on the Internet Playground*, 30 CARDOZO L. REV. 1641 (2009) (exploring various potential remedies for cyberbullying, finding all of them at least partially inadequate, and arguing that the tort of intentional infliction of emotional distress may be the best choice for a victim).

6. See Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to Students' Free Speech Rights*, 33 VT. L. REV. 283, 291–96 (2008) (describing legislation on cyberbullying in Arkansas, Delaware, Iowa, Minnesota, Nebraska, New Jersey, Oregon, South Carolina, and Washington); Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools To Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 148 (2009) (“[A]n increasing number of state legislatures . . . are mandating that local school boards adopt anti-bullying policies aimed at prevention and mitigation.”). There has also been some legislative action on cyberbullying at the federal level, spurred by the publicity surrounding the suicide of Megan Meier. See Henderson, *supra* note 3, at 394 (discussing the proposal of the Megan Meier Cyberbullying Prevention Act).

7. See *infra* Part II.D (discussing relevant Supreme Court precedent); *infra* Part II.E (discussing relevant lower-court precedent).

II. BACKGROUND

Cyberbullying is a growing phenomenon that is presenting a problem for school officials. Courts have not yet offered a great deal of guidance on the subject, although some Supreme Court precedent regarding schools and the First Amendment may be applicable. However, cyberbullying has become so prevalent that teachers, school officials, and attorneys in the educational system have taken note of the phenomenon.

A. THE DEFINITION AND PREVALENCE OF CYBERBULLYING

Cyberbullying involves "the intentional infliction of harm by the use of one or more media of electronic technologies,"⁸ including, but not limited to, social-networking websites such as Facebook and MySpace, chat rooms, instant messaging, and cell phones.⁹ If the perpetrator and victim are not both minors, the behavior that would otherwise be cyberbullying constitutes "cyberstalking" or "cyber-harassment."¹⁰ Because an estimated forty-five million children between the ages of ten and seventeen now use the Internet daily, problems with this sort of online harassment are growing in relation to problems with traditional schoolyard bullies.¹¹ In a 2006 study, four in ten teenagers identified themselves as victims of some sort of cyberbullying.¹² Based on the same study, it appears that cyberbullying is most common among fifteen and sixteen year olds and occurs more frequently among females.¹³

B. CHALLENGES FACING SCHOOLS

One of the factors that makes cyberbullying attractive to some students is the anonymity made possible by the use of electronic media. The

8. CAROL GRETA, IOWA DEP'T OF EDUC., CYBERBULLYING: DOING SOMETHING ABOUT IT, LAWFULLY 1, http://iowa.gov/educate/index.php?option=com_content&view=article&id=1718:cyberbullying-guidance&catid=411:legal-lessons&Itemid=2656.

9. See Auerbach, *supra* note 5, at 1643 ("Cyberbullying has many manifestations, including Instant Messenger, websites, e-mail, or cell phone text messages.")

10. *What Is Cyberbullying, Exactly?*, STOP CYBERBULLYING, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited Mar. 25, 2011).

11. Kirk R. Williams & Nancy G. Guerra, *Prevalence and Predictors of Internet Bullying*, 41 J. ADOLESCENT HEALTH S14, S15 (2007).

12. Ashley Surdin, *In Several States, a Push To Stem Cyber-Bullying*, WASH. POST, Jan. 1, 2009, at A3.

13. *Id.* Another 2006 study found that instant messaging is the most common medium for cyberbullying, with forty-four percent of teens who had been victims reporting that mean, threatening, or embarrassing comments had reached them through instant messaging. OP. RESEARCH CORP., CYBER BULLY TEEN 19 (2006), <http://www.fightcrime.org/cyberbullying/cyberbullyingteen.pdf>; see also Auerbach, *supra* note 5, at 1643 (discussing a study suggesting that seventy-five percent of teenagers between twelve and seventeen have experienced cyberbullying); Turbert, *supra* note 2, at 657 (citing a Department of Justice study that found victims report only eighteen percent of the most egregious incidents of cyberbullying to authorities).

anonymity of cyberbullying is also one of the biggest challenges that schools face in their attempts to investigate and punish this sort of behavior.¹⁴ Due to generational differences and the fast pace of technological development and change, school officials may not completely understand the relevant technological forum.¹⁵ Cyberbullying is incredibly difficult to contain and stop because of the ease with which computer-savvy students can send disparaging comments about fellow students to a large audience in a matter of seconds.¹⁶ In their efforts to protect victims and maintain an orderly learning environment, schools face a lack of clear precedent¹⁷ and must be wary of lawsuits from victims as well as cyberbullies. First, they may face lawsuits from cyberbullying victims based on claims of inadequate investigation procedures and punishment.¹⁸ Second, students punished for cyberbullying may raise a claim that the school lacked authority to address their conduct at all because it may not have occurred during school time or on school property.¹⁹ This is a threshold question to the First Amendment

14. See Beckstrom, *supra* note 6, at 287 (noting that anonymity for perpetrators has made cyberbullying more popular); Surdin, *supra* note 12, at A3 (“[Incidents of cyberbullying] can be time-consuming and difficult to investigate, given the veil of anonymity the Web offers.”); GRETA, *supra* note 8, at 2 (“The lack of the face-to-face element emboldens adults and children alike to communicate in a way in which they would not dream of doing otherwise.”). Because the Supreme Court has set a precedent of protecting at least some anonymous speech, Henderson, *supra* note 3, at 386, the anonymity of online speech may also dissuade school officials from taking action. The rationale for doing so, according to the Court, is that “anonymity encourages some authors who may be reluctant to enter the marketplace of ideas to do so without fear of retaliation, and . . . an ‘author generally is free to decide whether or not to disclose his or her true identity.’” *Id.* (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–42 (1995)).

15. Surdin, *supra* note 12, at A3. Possible confusion about the types of technology that are currently popular among the students at a particular school is a good reason to implement educational programs for school staff members. See *infra* Part III.B (discussing the importance of educational programs to prevent cyberbullying).

16. Chaffin, *supra* note 1, at 787–88.

17. See *infra* Part II.E (discussing lower-court precedent regarding cyberspeech and noting that many of these cases involve cyberspeech directed at school employees rather than students).

18. See Duffy B. Trager, *New Tricks for Old Dogs: The Tinker Standard Applied to Cyber-Bullying*, 38 J.L. & EDUC. 553, 560 (2009) (discussing possible bases for school-district liability when a student suffers from an incident of cyberbullying). See generally *Shaposhnikov v. Pacifica Sch. Dist.*, No. C 04-01288 SI, 2006 WL 931731 (N.D. Cal. Apr. 11, 2006) (granting summary judgment for the school district in a suit brought by a student who had been taunted by peers both in person and online for being a competitive ballroom dancer because the district had taken steps such as contacting parents and suspending students). For a discussion of ways in which school districts can prepare to respond effectively to cyberbullying and avoid these sorts of lawsuits, see *infra* Part III.B.

19. Lawsuits of this type may arise in any instance in which a school punishes a student for conduct where the connection to the school itself is not obvious. See *Bunger v. Iowa High Sch. Athletic Ass’n*, 197 N.W.2d 555, 558 (Iowa 1972) (interpreting the Iowa High School Athletic Association’s “beer rule” that mandated ineligibility for student athletes who the school found had ridden in vehicles with the knowledge that alcohol was present in the vehicle).

issues that are the focus of this Note. In *Bunger v. Iowa High School Athletic Ass'n*, the Iowa Supreme Court held that school authorities may promulgate rules and policies reaching conduct that "directly relates to and affects management of the school and its efficiency," with the additional requirement that these rules must be "reasonable."²⁰ The issues and evidence relevant to this threshold question will be similar to those the parties will raise in the First Amendment context, and thus this Note focuses primarily on precedent in that area. Finally, students facing punishment for content posted online may raise claims that the school district violated their First Amendment right to free speech.²¹ Students often think of social-networking websites in particular as places to broadcast personal opinions to friends and strangers alike, and schools face a serious dilemma in adopting policies that punish students based on such speech.²²

C. IOWA'S LEGISLATIVE RESPONSE

Most students who wish to find a legislative remedy for cyberbullying must look to state law because federal remedies are only available to students harassed for membership in a federally protected class such as a race or religious group.²³ As an example of currently available state remedies, the Iowa Legislature passed an anti-bullying law in 2007 based on a commitment to "providing all students with a safe and civil school environment in which all members of the school community are treated with dignity and respect."²⁴ The law mandated that every school district in the state develop

20. *Id.* at 563–65 (quoting *Bd. of Dirs. v. Green*, 147 N.W.2d 854, 858 (Iowa 1967)) (internal quotation marks omitted).

21. Sarah O. Cronan, Note, *Grounding Cyberspeech: Public Schools' Authority To Discipline Students for Internet Activity*, 97 KY. L.J. 149, 151 (2008); see also Surdin, *supra* note 12, at A3 ("[T]he biggest cause of schools' hesitation [to aggressively punish cyberbullying by students], educators and legal experts say, is the fine line between protecting students from harassment and observing their right to free speech.").

22. See KENNETH DAUTRICH ET AL., *THE FUTURE OF THE FIRST AMENDMENT: THE DIGITAL MEDIA, CIVIC EDUCATION, AND FREE EXPRESSION RIGHTS IN AMERICA'S HIGH SCHOOLS* 72–73 (2008) ("By the latter half of 2006, social-networking websites had established themselves as an extremely popular means for students to communicate with each other, competing with cell phone conversations, cell phone text messaging, and even more traditional e-mailing . . ."); see also Chaffin, *supra* note 1, at 784 n.88 ("MySpace creates a space, like a teenager's room, where they can express their own personality and invite friends to come and play. MySpace also invites strangers to be involved in the online room of the teenager."); Cronan, *supra* note 21, at 150 (illustrating the popularity of online "content-creating activity" such as personal websites and online journals that may be a creative outlet for many young people (internal quotation marks omitted)).

23. See Sacks & Salem, *supra* note 6, at 149 (listing possible bases of federal liability for bullying but noting that "[t]he vast majority of victims . . . are bullied for reasons that do not fall under this civil rights umbrella"). Cyberbullies most frequently choose their victims based on physical appearance, real or perceived sexual orientation, and gender expression. *Id.*

24. Act of Mar. 5, 2007, ch. 9, § 2(1), 2007 Iowa Acts 12 (codified at IOWA CODE § 280.28(1) (2009)).

an anti-bullying policy with certain characteristics by September 1, 2007.²⁵ The statute's definition of "bullying" is broad—it encompasses bullying via electronic media and includes conduct based on *any* "actual or perceived trait or characteristic" of the victim.²⁶ Although the statute has forced schools to begin putting procedures in place for responding to bullying in general, it leaves many questions unanswered, particularly in the area of cyberbullying.²⁷ In particular, while it addresses bullying "in schools, on school property, and at any school function, or school-sponsored activity regardless of its location,"²⁸ it does not give any guidance regarding off-campus cyberspeech that may affect students at school.²⁹ Faced with a lack of precedent from the Supreme Court on this specific issue, and state remedies that while representing steps in the right direction, leave many questions, schools must be prepared to frame arguments based on existing precedent when facing potential lawsuits.

D. RELEVANT SUPREME COURT PRECEDENT

The Supreme Court has, on a few occasions, spoken directly on the issue of how far schools may go in regulating student speech. The Court has also issued opinions on categories of speech falling outside of First Amendment protection and discussed the important role of education in American society. None of these cases, however, have considered the role of technology. Yet the discussion regarding the importance of education to American society and the categories of unprotected speech may prove useful to school officials when students challenge their actions to regulate cyberspeech.

1. Student-Speech Cases

The Supreme Court issued its most definitive statement on the authority of schools to discipline students for speech long before e-mail, Facebook, and text messaging existed. In *Tinker v. Des Moines Independent Community School District*, decided in 1969, the Court addressed a school's

25. *Id.* § 2(3) (codified at § 280.28(3)). The Iowa Legislature also provided a sample policy, including investigative procedures, publication protocol, and complaint forms. To review a reproduction of the sample policy, see GRETA, *supra* note 8, at 13–18.

26. § 280.28(2)(a)–(b) ("Electronic" includes but is not limited to communication via electronic mail, internet-based communications, pager service, cell phones, and electronic text messaging." (emphasis omitted)).

27. Over fifty percent of the states have enacted some form of legislation targeting traditional, face-to-face bullying in schools. Beckstrom, *supra* note 6, at 291. State codes do not address cyberbullying nearly as uniformly, however, given the relatively recent nature of the problem. *Id.*

28. § 280.28(3).

29. Beckstrom, *supra* note 6, at 293 ("The [Iowa] statute does not specifically state whether off-campus cyberbullying could be punishable conduct under the adopted school-district policy.").

decision to suspend students for wearing black armbands in protest of the Vietnam War.³⁰ After its famous observation that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”³¹ the Court held that school officials acted unconstitutionally when they punished the students for their protest.³² However, the Court also recognized that schools must maintain an orderly environment and acknowledged two exceptions to students’ First Amendment rights at school for speech that either: (1) substantially disrupts the workings of the school or (2) infringes on the rights of other students.³³ *Tinker* still provides the default frame of analysis for most courts addressing student-speech issues, with the exception of those cases that involve lewd or indecent speech or speech that can be reasonably interpreted as promoting an activity or behavior that is against school policy.³⁴

Until recently, the Supreme Court had only decided two additional cases on student speech, *Bethel School District No. 403 v. Fraser*³⁵ and *Hazelwood School District v. Kuhlmeier*.³⁶ *Kuhlmeier* is not instructive in the context of schools’ rights to punish students for cyberbullying because that case dealt with student speech that appeared in a school-sponsored publication.³⁷ Very rarely is there a situation in which statements tantamount to cyberbullying appear in a forum that a school itself sponsors. *Fraser*, however, further developed the “substantial disruption or invasion of the rights of others” student-speech exception outlined in *Tinker*, approving punishment of students for “offensively lewd and indecent speech.”³⁸ The high-school student in *Fraser* had delivered a speech nominating a classmate for an

30. 393 U.S. 503 (1969).

31. *Id.* at 506.

32. *Id.* at 514.

33. *See id.* at 513 (describing two exceptions to students’ right to free speech at school). The Court stated:

But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Id.

34. *See infra* notes 35–38 (discussing cases in which the Supreme Court developed variations on the *Tinker* analysis for two different situations).

35. 478 U.S. 675 (1986).

36. 484 U.S. 260 (1988).

37. *See generally id.* (holding that school districts have the right to closely regulate speech that appears in a forum sponsored by the school itself). Although courts would rarely look to this case in a cyberbullying lawsuit, it is conceivable that harassing comments could appear in some sort of forum on a school website. If this were the case, the argument for school regulation would be strong because the school would have an interest in keeping its own publications free of abusive cyberspeech.

38. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

elected office in the student government.³⁹ The speech, given to an audience of approximately 600 teenage students, referred to the candidate through "an elaborate, graphic, and explicit sexual metaphor."⁴⁰ In ruling for the school that punished Fraser for this speech, the Court recognized that schools have an interest in promoting civil discourse that may act as a counterweight to First Amendment concerns.⁴¹ Thus, if a student's speech is arguably lewd and indecent, courts will likely be very deferential toward the actions of the school accused of a constitutional violation.

The Supreme Court sided with school officials again in its most recent student-speech case. In *Morse v. Frederick*, a student spectator at a school-sponsored rally for an Olympic torch relay held up a banner that read "BONG HiTS 4 JESUS."⁴² In upholding the student's suspension, the Court did not revisit the *Tinker* analysis or classify the speech as offensive, as in *Fraser*. Rather, it created what seems to be another exception to the First Amendment rights enjoyed by students, applicable when schools are acting to quash speech they reasonably interpret as promoting drug use.⁴³ This recognition of the school's interest in protecting students from certain statutorily recognized harms may help schools facing First Amendment lawsuits for punishing cyberbullies, depending on the specific facts of the case.

2. Unprotected Speech

In several decisions that may be relevant to schools interested in punishing students for online speech without violating the First Amendment, the Supreme Court has recognized additional categories of speech that, in its opinion, do not merit First Amendment protection.⁴⁴ For example, according to the Supreme Court in *Chaplinsky v. New Hampshire*, these categories "include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."⁴⁵ The *Chaplinsky* Court also noted,

39. *Id.* at 677.

40. *Id.* at 677-78.

41. *See id.* at 681 ("The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."); *id.* at 683 ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.").

42. 551 U.S. 393, 397 (2007) (internal quotation marks omitted).

43. *See id.* ("[S]chools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."); *id.* at 408-09 ("The particular concern to prevent student drug abuse at issue here, embodied in established school policy extends well beyond an abstract desire to avoid controversy." (citations omitted)).

44. *See Chaffin, supra* note 1, at 799 ("[I]n the view of the Supreme Court, 'not all speech is of equal First Amendment importance,' because not all speech serves the purposes for which the First Amendment provides protection." (footnote omitted) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985))).

45. 315 U.S. 568, 572 (1942).

"such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."⁴⁶ *Chaplinsky* and other cases that single out varieties of speech as less deserving of First Amendment protection apply beyond the school context, but they may provide a strong foundation for arguments based on student-speech precedent. School officials who want to combat cyberbullying may be able to make a convincing analogy between these unprotected categories of speech and abusive cyberspeech a student directs at a classmate. One could certainly make a convincing argument that speech taunting or humiliating a student that is disseminated to his or her peers lacks social value and does not contribute in any meaningful way to the civil discourse schools would ideally promote amongst their students.

3. Supreme Court Treatment of Defamation

Schools have seen mixed results in defending against First Amendment lawsuits by cyberbullies in lower courts. Because many of the cases in which schools have been unsuccessful have dealt with speech directed at school officials, a school facing a lawsuit stemming from cyberbullying directed at a *student* would surely wish to argue for more deference than courts have given schools in previous cases. A school could base this argument on an analogy to Supreme Court precedent regarding defamation. Defamation is an "ancient" tort designed to provide a remedy when the tortfeasor's damaging statements about the victim harm the victim's reputation.⁴⁷ For the purposes of this Note, it is important only to point out that the Supreme Court, in *New York Times Co. v. Sullivan*, set a higher bar for recovery on defamation grounds when the allegedly defamed individual is a public official.⁴⁸ The motivation behind this different standard for public officials is that "a private person has less likelihood 'of securing access to channels of communication sufficient to rebut falsehoods concerning him' . . . and has not voluntarily placed himself in the public spotlight."⁴⁹ These observations, one could argue, also apply on a smaller scale to students as compared to school officials. School officials often address the student body as a whole. They have easy access to the disciplinary procedures of the school system, and in most cases they are less likely to suffer serious emotional consequences from critical cyberspeech than students because they have willingly accepted a position of power that clearly comes with the responsibility to sometimes make unpopular decisions.

46. *Id.*

47. Auerbach, *supra* note 5, at 1667.

48. See 376 U.S. 254, 279-80 (1964) (establishing a rule that bars recovery by a public official unless the official can show "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

49. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 338-39 (1974) (citation omitted).

E. LOWER COURTS' TREATMENT OF CYBERBULLYING

Because the Supreme Court has not yet provided any guidance regarding student speech in electronic media, school districts must look to lower-court decisions in structuring their disciplinary policies. Many of the lower-court decisions regarding students punished for online speech dealt with unflattering postings or publications about school employees or administrators.⁵⁰ These courts generally applied some variation of the "substantial disruption" analysis from *Tinker*.⁵¹

In *Coy ex rel. Coy v. Board of Education*, a district court used the *Tinker* standard to evaluate the response of a school that punished a student for a website that included a list of "losers" who were *classmates* of the appellant.⁵² Also, a district court in Pennsylvania held that the school's policy was unconstitutionally vague under *Tinker* and gave summary judgment to a student on a free-speech claim after the student's school punished him for posting several messages online that mocked a fellow student.⁵³ The lower federal courts, then, have based the majority of their decisions about student cyberspeech squarely on the 1969 *Tinker* decision, without regard for the lewdness and obscenity exception from *Fraser* or the "promotion of a desired social policy" exception from *Morse*. However, cyberbullying may include speech that is lewd or obscene, and the recent adoption of anti-bullying laws in many states suggests that bullying may be an issue closely akin to drug abuse in its harmfulness to students. Therefore, schools that face First Amendment lawsuits from students punished for acts of cyberbullying may have valid arguments based on these two later student-speech cases.

III. ANALYSIS

A. WHY SCHOOLS ARE THE BEST LINE OF DEFENSE AGAINST CYBERBULLYING

The nation's schools are well-situated to instill in young people respect for others and the ability to participate in a meaningful public debate. Because cyberbullying is a relatively recent development, there is still a great

50. See Beckstrom, *supra* note 6, at 302–04 (citing Layshock *ex rel. Layshock v. Hermitage Sch. Dist.*, 412 F. Supp. 2d 502 (W.D. Pa. 2006)) (analyzing a school's punishment of a student for creating a parody profile of a high-school principal on MySpace.com); J.S. *ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002) (regarding a student-created website that included content insulting to the student's algebra teacher and middle-school principal).

51. See Beckstrom, *supra* note 6, at 302–03 (discussing cases in which lower courts applied the *Tinker* standard to "off-campus cyberspeech" directed at school employees).

52. *Id.* at 304–05 (internal quotation marks omitted) (citing *Coy ex rel. Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 795, 797–801 (N.D. Ohio 2002)). In this case, the court ruled that the district had not yet made a showing that it was justified in expelling the student because of disruption to the school environment. *Coy*, 205 F. Supp. 2d at 797–801. The student created the website using his own time and equipment, and the district only became aware of it when a teacher caught him attempting to access it at school. Beckstrom, *supra* note 6, at 304.

53. *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 706 (W.D. Pa. 2003).

deal of debate regarding the best way to protect children from its potential harms.⁵⁴ Both the First Amendment's guarantee of free speech⁵⁵ and the value of encouraging students to express themselves weigh heavily in the balance for those who oppose more school involvement in punishing students for cyberspeech.⁵⁶ The Supreme Court has stated, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."⁵⁷ However, the Court has also carved out categories of speech that do not merit First Amendment protection⁵⁸ and has noted that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."⁵⁹ The Supreme Court's limitations on students' freedom of speech, the Court's recognition of schools as uniquely situated to instill youth with positive social skills, and the lack of other effective means to combat cyberbullying all suggest that schools should take the lead on this issue.

Given the practical realities of the ways schools interact with their students and the importance of schools' role in shaping responsible citizens, schools are well situated to combat cyberbullying. The Supreme Court recognized this potential in *Brown v. Board of Education*, arguably the Court's most important ruling on education to date, when it referred to education as "the very foundation of good citizenship."⁶⁰ The Supreme Court has also acknowledged the tremendous importance of schools in social and civic development.⁶¹ In *Brown*, the Court stated that education "is a principal instrument in awakening the child to cultural values . . . and in helping him

54. See generally Surdin, *supra* note 12 (discussing the debate over what institutions or actors should take the lead in combating cyberbullying).

55. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

56. See Surdin, *supra* note 12, at A3 (quoting Aden Fine, a lawyer from the American Civil Liberties Union, as stating, "The problem with these [state anti-bullying] laws is that schools are now trying to control what students say outside of school . . . We have to keep in mind this is free speech we're talking about." (internal quotation marks omitted)).

57. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

58. *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940) ("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.").

59. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

60. 347 U.S. 483, 493 (1954); see also JEAN O'GORMAN HUGHES & BERNICE R. SANDLER, *PEER HARASSMENT: HASSLES FOR WOMEN ON CAMPUS* 1 (1988) ("At best, [schools] can provide the opportunity to further the social growth of students, with [students] learning how to get along with peers and how to handle differences of race, ethnicity, and gender.").

61. Chaffin, *supra* note 1, at 797-98.

to adjust normally to his environment."⁶² This suggests that school officials are also the appropriate actors to both punish and prevent cyberbullying. One scholar aptly describes free speech in the school context as "a First Amendment learner's permit."⁶³ This characterization sums up the importance of schools in teaching students how to relate positively and constructively with their peers and also sheds light on the wisdom of allowing a school to punish students for especially egregious violations committed with their "permits."⁶⁴ This respect for the role of schools in teaching children how to relate to one another and participate in a civil exchange of ideas may also work in favor of a school accused of overstepping constitutional boundaries after punishing a cyberbully. A legislative scheme that gives schools primary responsibility for punishing cyberbullies also seems wise given the lack of effective remedies available to victims outside their schoolhouse gates.⁶⁵ Schools can also act relatively quickly, punishing or deterring bullies while the parties involved are still in school together; whereas a student seeking federal or state remedies such as tort claims may have to wait too long for relief, possibly until after the student has dropped out or graduated.⁶⁶ Additionally, because incidents of cyberbullying "will rarely be severe enough to be deemed tortious,"⁶⁷ a system that addresses cyberbullying through the schools will be best equipped to deter and stop offenders and give relief to victims.

B. PRELIMINARY MATTERS AND PRECAUTIONS FOR SCHOOLS

Before discussing how a school facing a First Amendment lawsuit should argue for the right to punish students for harmful cyberspeech about

62. *Brown*, 347 U.S. at 493; see also *Fraser*, 478 U.S. at 683 ("[S]chools must teach by example the shared values of a civilized social order.").

63. Chaffin, *supra* note 1, at 805.

64. See *id.* at 806 ("Cyberbullying is an abuse that requires revoking the verbal assailants' learners' permits until they learn to drive on the citizenship road wisely.").

65. See generally Sacks & Salem, *supra* note 6 (discussing the inadequacy of remedies currently available for victims of bullying in general). Victims of cyberbullying may be even more at a loss for legal remedies than victims of traditional bullying because cyberbullying is a more recent and frequently misunderstood phenomenon.

66. See *id.* at 150 ("Even if a victim obtains a legal remedy under state or federal law, such remedy comes long after the harm has been done—after the student has changed schools, dropped out, or is well past eighteen.").

67. Auerbach, *supra* note 5, at 1647. Auerbach argues that the tort of defamation is inadequate in many cases of cyberbullying because (1) "statements of opinion that cannot reasonably be interpreted as stating actual facts enjoy First Amendment protection" and (2) "many cyberbullying incidents involve a private communication between the harasser and the harassed," while defamation requires communication of the harmful message to an unprivileged third party. *Id.* at 1667. Auerbach ultimately argues that the tort of intentional infliction of emotional distress may be the best weapon against a cyberbully but notes that this tort requires a finding of "outrageous" conduct, which may be difficult to come by under the facts of a typical cyberbullying case. *Id.* at 1669–71.

classmates, it is important to note that cyberbullying prevention is likely much less time-consuming and expensive than punishment or litigation. All sides in the cyberbullying debate seem to agree on one thing: schools should talk to students about the harms associated with using technology as a social weapon against their peers.⁶⁸ Carol Greta, an attorney with the Iowa Department of Education, suggests implementing professional-development programs to help staff spot and effectively respond to cyberbullying, as well as efforts to help schools partner with parents.⁶⁹ While parents can and certainly should take steps to protect their children from online harm,⁷⁰ in some cases this is not enough to prevent cyberbullying.⁷¹ Therefore, a two-pronged prevention program dealing with Internet abuses directed toward both parents and school officials would be most effective.

In addition to preventative education for parents, students, and staff, schools should also attempt to prevent litigation by clearly posting anti-bullying and computer-usage policies.⁷² Additionally, should a serious issue arise, it is critically important for the school to "[d]ocument, document, document."⁷³ Evidence of any sort of nexus between the cyberspeech at issue and the educational environment can only help a school facing a First Amendment suit by a student. At least one federal court has acknowledged that in some situations, student speech uttered (or presumably typed) off campus could create a substantial disruption at school,⁷⁴ making it key for a school to clearly articulate the nature of the disruption. One could envision a situation in which student speech posted online from an off-campus location could make its way into study halls or computer-skills courses and

68. Surdin, *supra* note 12, at A3 ("Champions and critics of the laws agree that preventative education is a more powerful deterrent to cyber-bullying than discipline."); *see also id.* (quoting Patricia Agatston, a cyberbullying expert, as saying, "A lot of it can be prevented if we can just teach kids to think before they put things out there." (internal quotation marks omitted)).

69. GRETA, *supra* note 8, at 9. Iowa's anti-bullying law recommends, but does not require, schools to implement preventative education programs. IOWA CODE § 280.28(4) (2009) ("[School authorities] are encouraged to establish programs designed to eliminate harassment and bullying in schools."). Schools should implement such programs "[t]o the extent that funds are available." *Id.*

70. *See Beckstrom, supra* note 6, at 314 (stating that good preventative steps for parents include "placing the computer in a public area of the home where it can be easily monitored by an adult, using passwords on both the computer and the Internet to prevent unauthorized access, and limiting the time spent on the Internet").

71. *See RYAN'S STORY, supra* note 4 (noting that Ryan Halligan's parents set strict rules for his online activities, but this did not prevent their son from falling victim to cyberbullying by his fellow students).

72. GRETA, *supra* note 8, at 9. Iowa's anti-bullying legislation also requires each school to include in its policy "[a] statement of the manner in which the policy will be publicized." § 280.28(3)(g).

73. GRETA, *supra* note 8, at 8.

74. Turbert, *supra* note 2, at 672 (citing *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 (2d Cir. 1979)).

create significant distraction and embarrassment for the targeted student. The Supreme Court's language in *Morse* suggests that the Court understands the difficulties school officials face in responding to student conduct and that it may be inclined to defer to these officials' decisions, particularly when the school has made a good-faith effort to comply with the Constitution.⁷⁵

C. SCHOOL DEFENSES UNDER EXISTING STUDENT-SPEECH PRECEDENT

A school in the position of defending against a claim that it violated a student's First Amendment rights should first put forth an argument based on *Tinker*, as this case presents the traditional framework for evaluating responses to student speech. The school should then supplement its *Tinker* argument with analogies to *Fraser* and *Morse*, if appropriate.

1. *Tinker*

To prevail in a First Amendment suit brought by a student punished for cyberbullying, a school should first attempt to meet the "substantial disruption" and "invasion of the rights of others" standards of *Tinker*.⁷⁶ The school "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."⁷⁷ If a school has carefully documented the events leading up to punishing a student for cyberspeech, the school should be able to make a convincing argument regarding a "substantial disruption" of the educational environment. Although the punished student would likely have typed the bullying language at an off-campus location, it is not unprecedented for courts to find that cyberspeech has created a substantial disruption when there is at least some nexus to the actual school facilities.⁷⁸ One commentator has suggested that attempting to draw a line between on-campus and off-campus cyberspeech is a meaningless exercise because of the "borderless" nature of the Internet—no matter where a student sits when he or she types harassing comments into a blog or instant-

75. *Morse v. Frederick*, 551 U.S. 393, 409–10 (2007) ("School principals have a difficult job, and a vitally important one. . . . [The principal in this case] had to decide to act—or not act—on the spot. It was reasonable for her to conclude that [she should act in the way she did].").

76. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969). Although *Tinker* has been the starting point for student-speech cases since 1969, Justice Thomas would entirely abolish its restrictions on a school's ability to regulate student speech and give nearly complete deference to the disciplinary decisions of school officials. *Morse*, 551 U.S. at 410 (Thomas, J., concurring) ("I write separately to state my view that the standard set forth in [*Tinker*] is without basis in the Constitution.").

77. *Tinker*, 393 U.S. at 509.

78. See *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38–39 (2d Cir. 2007) (holding that a student who created an instant-messaging icon depicting his teacher being shot created a substantial disruption with his off-campus activities because the student could have foreseen that the icon would come to the attention of people at school).

messenger conversation, the speech is almost instantaneously accessible everywhere there is an Internet connection.⁷⁹ Substantial disruptions could also conceivably come from "aggressive victims," students who act out after experiencing bullying and may be a danger to their classmates.⁸⁰

In many cases, it should also be relatively easy for a school to illustrate that a cyberbully has interfered with the right of the victim to receive an education. Victims of cyberbullying often experience serious emotional and physical symptoms and occasionally drop out or transfer to different schools.⁸¹ Student victims may show increased absenteeism and tardiness, as well as reduced involvement in activities to avoid the bullies. In addition to the interference with the rights of the victim, a school may be able to show that cyberbullying negatively affects the performance of other students as well (if, for example, a large group of students is involved in an online dispute that distracts them from their schoolwork).

2. *Fraser*

Under *Fraser*, if a school punishes a cyberbully for cyberspeech that is lewd, indecent, or offensive, a court will likely bypass the traditional analysis of *Tinker* and give great deference to the school officials' actions.⁸² References to *Fraser* will not be appropriate in all cases of cyberbullying, but in many instances the insults that cyberbullies direct at their victims are arguably lewd or indecent because favorite topics of cyberbullies include perceived or real sexual orientation and sexual activities.⁸³ Because the

79. See Renee L. Servance, Comment, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1237 (2003) ("Speech should not be defined by the computer on which it originates. Courts should instead apply the principle that is intuitive to most Internet users: Internet speech resides in cyberspace, which is borderless and exists wherever there is a connection to the Internet.").

80. See Chaffin, *supra* note 1, at 779 (discussing "aggressive victims" and the dangers they pose to the educational environment, including violence and delinquent behavior (internal quotation marks omitted)). Schools should not take lightly the threat posed by aggressive victims—a government study from 2000 found that more than two-thirds of students who had committed school shootings since 1974 had been "persecuted, bullied, threatened, or injured." BARBARA COLOROSO, *THE BULLY, THE BULLIED, AND THE BYSTANDER: FROM PRESCHOOL TO HIGH SCHOOL* 56 (2004) (internal quotation marks omitted).

81. See Auerbach, *supra* note 5, at 1641–42 (discussing Ghyslain Raza and David Knight, two students who withdrew from school after cyberbullying from their fellow students became unbearable).

82. Bethel Sch. Dist. No. 403 v. *Fraser*, 478 U.S. 675, 685 (1986) ("[The] School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech."); see *Morse v. Frederick*, 551 U.S. 393, 405 (2007) ("*Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*." (citation omitted)).

83. See, e.g., Auerbach, *supra* note 5, at 1642 (discussing the case of David Knight, a cyberbullying victim whose peers set up a website accusing him of pedophilia); Turbert, *supra*

student speech at issue in *Fraser* occurred on campus, arguments based on this case alone will not be enough to mount a successful defense for a school that has punished a student for online speech that originated elsewhere. However, when coupled with a compelling argument about disruption of the educational environment or interference with the rights of others, these arguments will likely strengthen the school's case.

3. *Morse*

The Supreme Court again stepped away from the *Tinker* mode of analysis in its most recent student-speech case, giving its stamp of approval to a school's punishment of a student for "speech that can reasonably be regarded as encouraging illegal drug use."⁸⁴ The Court made two key observations about the issue of drug use that could also apply to the emerging issue of cyberbullying. First, the Court seemed persuaded to approve the school's response to the speech promoting drug use in part because legislative responses to the issue of drugs have indicated that the states have an important role to play in this area.⁸⁵ Cyberbullying is increasingly comparable to drug use in this respect because of the increasing amount of legislation and state involvement regarding preventative programs and school policies. In both areas, legislation has given schools a unique role in prevention based on the idea that "[t]he State . . . has an independent interest in the well-being of its youth."⁸⁶ Secondly, the *Morse* Court emphasized the harmful effects of drug abuse as a justification for its deference to the school's response to drug-related speech.⁸⁷ Similar to teenage drug abuse, negative effects of cyberbullying include absenteeism, tardiness, less participation in extracurricular activities to avoid bullies, or even suicide.⁸⁸ Cyberbullying, like drug abuse and addiction, has the potential to cause serious harm to students in the years when they are most vulnerable.⁸⁹ A school facing a First Amendment suit for punishing a

note 2, at 651–52 (reproducing a conversation about a student in an online forum, including profanities and calling the student a "faggot").

84. *Morse*, 551 U.S. at 397.

85. *See id.* at 408 ("Congress has declared that part of a school's job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs" (citation omitted)).

86. *Ginsberg v. New York*, 390 U.S. 629, 640 (1968).

87. *See Morse*, 551 U.S. at 407 ("School years are the time when the physical, psychological, and addictive effects of drugs are most severe. . . . [T]he effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." (quoting *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661–62 (1995)) (internal quotation marks omitted)).

88. *See Chaffin*, *supra* note 1, at 781 (discussing potential harm to cyberbullying victims).

89. *See* Corinne David-Ferdon & Marci Feldman Hertz, *Electronic Media, Violence, and Adolescents: An Emerging Public Health Problem*, 41 J. ADOLESCENT HEALTH S1, S3 (2007) (stating that studies show "an association between electronic aggression victimization and a range of psychosocial difficulties and risk factors, including emotional distress, school conduct problems,

student cyberbully should therefore draw an analogy to the *Morse* case in arguing for deference from the reviewing court.

D. AN ARGUMENT FOR A TOUGHER STANDARD WHEN STUDENTS TARGET CLASSMATES

The vast majority of existing off-campus student-speech precedent deals with cyberspeech directed at school officials, such as principals and teachers.⁹⁰ One could certainly argue that these online attacks are just as harmful and potentially disruptive as attacks directed at students. In the interest of presenting the most comprehensive defense possible, however, when the punishment at issue is for cyberspeech directed at *another student*, the school should argue for even greater deference from the reviewing court. The school could easily analogize to a principle of defamation law, which places a higher burden for proving injury on victims that are public officials as opposed to private citizens.⁹¹ The Supreme Court's development of a higher standard to recover for public officials was based on some inherent differences in the ability of private citizens and public officials to deal with disparaging statements. These distinctions also apply to students as compared to school officials.

When compared to a public official, a private citizen is less able to "secur[e] access to channels of communication sufficient to rebut falsehoods concerning him."⁹² Similarly, students are not in any position to clear up lies spread by a cyberbully or contain the damage to their reputations, whereas school officials are in a position of power and may be able to use the resources of the school to stop the abuse and refute false statements posted online. Also, the Supreme Court has noted that people who voluntarily place themselves in public positions should understand and

weapon-carrying at school, low caregiver-adolescent connectedness and sexual solicitation"); Trager, *supra* note 18, at 556-57 ("[C]yber-bullying may have both short and long term negative effects on students Short term effects can be emotional harm, including low self-esteem, anxiety, depression and social withdrawal. Long term effects include depression and low self-esteem as well as suicide." (footnotes omitted)).

90. See, e.g., *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587 (W.D. Pa. 2007) (regarding the punishment of a student for creating a parody profile of his principal on MySpace.com); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446 (W.D. Pa. 2001) (regarding the punishment of a student who circulated a crude e-mail critical of his school's activities director); *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (regarding the punishment of a student who created a vulgar website criticizing the administrators of his school). For a thorough listing of lower-court decisions in cyberbullying cases, most of which involved cyberspeech directed at school officials, see GRETA, *supra* note 8, at 5-8.

91. See *supra* note 48 (stating the more stringent test for proving defamation when the alleged victim is a public official).

92. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 70 (1971) (Harlan, J., dissenting), *abrogated by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

be prepared to cope with the risk of harsh criticism.⁹³ In the educational context, one could argue that school officials must understand that they run the risk of criticism from unhappy students and, as adults and professionals, should be better prepared to deal with this sort of abuse than the young people they teach.⁹⁴

A school could argue that courts should treat harmful cyberspeech directed at students more harshly than speech directed at school officials because the former may bear less resemblance to types of speech the First Amendment is most concerned with protecting—particularly political speech and “truth-seeking” speech. Political speech contributes to the democratic process by encouraging a debate about those who govern amongst those who are governed.⁹⁵ Student-directed cyberbullying does not serve this purpose because its victims are not in positions of power.⁹⁶ Justice Brennan criticized the public-official/private-citizen distinction in defamation jurisprudence, arguing that the determinative factor should be society’s interest in learning the truth about a particular topic.⁹⁷ Under this approach as well, it is clear that cyberbullying directed at a fellow student has little, if any, social or political value. An ostracized student’s perceived sexual orientation, weight, or any other targeted characteristic is not a matter of public concern, and stifling discussion on the topic will hardly be a serious loss to the civil discourse that schools are expected to promote. Cyberbullying does not advance, and in many cases may actually inhibit, any sort of constructive discourse that aims to find truth.⁹⁸ Cyberbullying directed at school officials often has little value as political or truth-seeking speech, but finding such value in student-directed cyberspeech is even less

93. See *Gertz*, 418 U.S. at 344 (“An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case.”); *id.* at 338–39 (noting that a private citizen “has not voluntarily placed himself in the public spotlight”).

94. Of course, it is not always the case that school officials do not suffer emotional consequences from cyberspeech that are every bit as serious as those affecting student victims. In one cyberbullying case, a student posted a website that, among other things, solicited twenty-dollar donations so the student could hire a hitman to kill his teacher and featured a photo of the teacher that morphed into a photo of Adolf Hitler. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851–52 (Pa. 2002). The teacher was understandably upset and had to leave her teaching position for the year due to anxiety and depression. *Id.* at 852.

95. Chaffin, *supra* note 1, at 804–05.

96. It is true that many incidents of student cyberspeech directed at school officials have consisted of little more than juvenile personal attacks, as opposed to “truth-seeking” or political speech. This Note does not take the position that schools should be less able to act in situations like these; it simply offers the defamation-based argument as one additional possibility for schools defending their actions on behalf of a student bullied online.

97. *Rosenbloom*, 403 U.S. at 43 (“If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved . . .”).

98. Chaffin, *supra* note 1, at 802 (“Cyberbullies’ opinions serve only to silence, intimidate, and inflict pain and do not encourage any reasoned deliberation about ‘truth’ . . .”).

likely, and thus a school could argue that courts should view this variety of cyberbullying as less eligible for First Amendment protection.

IV. CONCLUSION

Cyberbullying is a serious threat to young people and will likely become more prevalent as more young people communicate and socialize using the Internet, cell phones, and other technological devices. In the wake of several tragic and well-publicized cases of cyberbullying, states have begun asking their schools to take action to protect students. Schools are well-situated to address this problem because of their role in teaching students to relate positively to one another but are understandably uneasy about overstepping constitutional boundaries when punishing student speech. Existing Supreme Court precedent on student speech, including *Tinker*, *Fraser*, and *Morse*, provides a powerful argument for a school's right to punish students for cyberbullying that originates off campus. Lower-court decisions on this issue have overwhelmingly involved student speech directed at school officials, and schools that have punished students in these cases have had mixed results. When a school takes action against harmful cyberspeech that targets a student, however, the school could argue for greater deference from the reviewing court based on a defamation-law-inspired distinction between students and school officials. There is certainly value to allowing students the freedom to express themselves with the content they post online. When that content crosses the line from harmless or thought-provoking to hurtful, however, schools should not be afraid to protect victims from what could be serious emotional harm and educational disruption.

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